UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE DAVID LAVOIE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 01-93-B-C***
	)	
MIDDLESEX MUTUAL	***)***	
ASSURANCE COMPANY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In this action arising from the refusal of defendant Middlesex Mutual Assurance Company ("Middlesex") to provide coverage pursuant to a homeowner's insurance policy issued to plaintiff George David Lavoie, Middlesex moves for summary judgment as to five of the six counts of Lavoie's complaint. Defendant's Motion for Partial Summary Judgment, etc. ("Defendant's Motion") (Docket No. 13) at 1; *see generally* Complaint, attached to Notice of Removal (Docket No. 1). For the reasons that follow, I recommend that the Defendant's Motion be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could

resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

The parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Loc. R. 56, reveal the following relevant to this recommended decision:

In April 2000 Lavoie's home on Route 27 in Pittston, Maine (the "House") was insured pursuant to a homeowner's policy issued by Middlesex. Defendant's Statement of Undisputed Material Facts in Support of Partial Summary Judgment ("Defendant's SMF") (Docket No. 14) ¶ 1; Plaintiff's Response to Defendant's Statement of Undisputed Material Facts and Plaintiff's Statement of Undisputed Material Facts ("Plaintiff's Opposing SMF") (Docket No. 19) ¶ 1. On April 24, 2000 the House was destroyed by a fire. *Id.* ¶ 2.

Kenneth Grimes, a senior fire investigator with the State of Maine Fire Marshal's office, examined the fire scene, ultimately determining that the fire intentionally was set with the use of an accelerant. *Id*. ¶ 3. However, Grimes' initial report, dated May 2, 2000, did not state that the fire was intentionally caused. Plaintiff's Opposing SMF ¶ 25; Fire Investigation Report dated May 2, 2000 ("First Grimes Report"), attached as Exh. A to Plaintiff's Opposing SMF. Instead, this report stated that the cause of the fire was "[u]ndetermined at this time." Defendant's Reply to Plaintiff's Statement of Undisputed Material Facts ("Defendant's Reply SMF") (Docket No. 27) ¶ 25; First Grimes Report.

Middlesex retained Robert W. Long, a licensed private investigator specializing in fire and explosion investigations, who examined the fire scene and concluded that the fire was the result of an intentional act. Defendant's SMF ¶ 4; Plaintiff's Opposing SMF ¶ 4.

Grimes amended his report after Long concluded that the fire had been set intentionally. Plaintiff's Opposing SMF ¶ 26; Letter dated May 12, 2000 from Robert W. Long to Middlesex Mutual Assurance Company ("Long Report"), attached as Exh. 1 to Deposition of Robert W. Long ("Long Dep."), attached as Exh. C to Defendant's SMF; Fire Investigation Report (Amended) dated July 7, 2000 ("Amended Grimes Report"), attached as Exh. C to Plaintiff's Opposing SMF.[1] Grimes did so in part because of "exchange of information with the insurance company." Plaintiff's Opposing SMF ¶ 27; Deposition of Kenneth Grimes ("Grimes Dep."), attached as Exh. B to Defendant's SMF, at 22.

Lavoie testified that he sustained a serious injury in January 1999 while driving his snowplow. Defendant's SMF ¶ 12; Plaintiff's Opposing SMF ¶ 12. This injury has prevented him from operating and working at his own paving business. *Id*. ¶ 14. Once Lavoie's paving business ceased operating,

[1] Although Lavoie states that "Mr. Grimes only changed his opinion" after the issuance of the Long Report, Plaintiff's Opposing SMF ¶ 26, I agree with Middlesex that this characterization is inaccurate inasmuch as the First Grimes Report expressed no opinion as to the cause of the fire, merely stating that its cause was undetermined, *see* Defendant's Reply SMF ¶ 26.

his wife's income contributed significantly to the payment of household expenses. *Id*. ¶ 15. However, she stopped contributing to the household budget when, several weeks before the fire, she left Lavoie and moved out of the House. *Id*. ¶ 16. As a result, Lavoie was left primarily with only disability income and the value of his remaining business equipment to pay personal and family expenses into the future. *Id*. ¶ 17.

Following the fire Lavoie sought payment from Middlesex by submitting sworn proof of loss claims for his fire-damaged real and personal property. *Id*. ¶ 18. At his examination under oath, he denied that he had caused the fire. *Id*. ¶ 20. Lavoie filed suit against Middlesex on or about April 11, 2001. *Id*. ¶ 23. Soon thereafter, relying upon the experts' conclusions that the fire was incendiary and having concluded that Lavoie had the motive and opportunity to have caused the fire, Middlesex denied his claim. *Id*. ¶ 24.

At his deposition, Lavoie claimed that Middlesex had caused him emotional distress by not paying his claim, by not returning his phone calls and, then, when Middlesex did speak to him, by being rude and putting him on a speaker phone. Defendant's SMF ¶ 21; Deposition of George David Lavoie ("Lavoie Dep."), attached as Exh. D to Defendant's SMF, at 47-48.

In addition, according to Lavoie:

1. Middlesex was aware of his physical and marital problems during the period it was investigating his claim. Plaintiff's Opposing SMF ¶ 29; Lavoie Dep. at 46.[2]

2. He characterizes his treatment by Middlesex as having been "jerk[ed]." Plaintiff's Opposing SMF ¶ 30; Examination Under Oath of George Lavoie ("EUO"), attached as Exh. A to Defendant's SMF, at 83.[3]

[2] Lavoie's assertion that Middlesex also was aware of his "psychological" and "financial" problems, Plaintiff's Opposing SMF ¶ 29, is neither admitted nor supported by the citation given. Middlesex protests, *inter alia*, that Lavoie is not competent to testify as to Middlesex's awareness at any time during the investigation period, Defendant's Reply SMF ¶ 29; however, this representation (*continued on next page*)

3. Middlesex delayed the taking of his EUO even though (he asserts) he told the company he was available at any time for it to be taken at the office of his lawyer. Plaintiff's Opposing SMF ¶ 31; Defendant's Reply SMF ¶ 31.[4]

4. He believes that Middlesex's delay in investigating and deciding whether to pay his claim was for the purpose of "string[ing] [him] along." Plaintiff's Opposing SMF ¶ 32; Lavoie Dep. at 46.[5] This "stringing along" included being rude to him on the phone, refusing to return his calls and putting him on a speaker phone as a method of intimidating and ridiculing him. Plaintiff's Opposing SMF ¶ 33; Lavoie Dep. at 45-46.[6] He also believes that Middlesex delayed its investigation and taking his EUO to make it more difficult for him to file a lawsuit within the limitations period. Plaintiff's Opposing SMF ¶ 34; Lavoie Dep. at 46.[7]

5. He believes that Middlesex "swayed" the Fire Marshal's office into reaching a conclusion that the fire was intentionally set. Plaintiff's Opposing SMF ¶ 38; Lavoie Dep. at 41, 51-52.[8] He reached this conclusion, and determined that Middlesex's own investigation was inadequate, based on the fact that a drug dog did not detect accelerant and the fact that Middlesex did not test his carpet. Plaintiff's Opposing SMF ¶ 39; Lavoie Dep. at 41-42.[9] In addition, Lavoie talked to Grimes,

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implicitly is premised on his personal knowledge of the information he gave Middlesex.

[3] Middlesex objects that this statement constitutes conclusory, "groundless speculation." Defendant's Reply SMF ¶ 30. I agree that it is conclusory, but address this point in my analysis, below.

[4] However, Lavoie was unable to disprove Middlesex's contention that responsibility for any delay rested with his predecessor counsel. Defendant's Reply SMF ¶ 31; Lavoie Dep. at 73, 76-78.

[5] Middlesex objects that this statement is nothing more than "groundless speculation." Defendant's Reply SMF ¶ 32. Again, I agree but address this point below.

[6] Although Middlesex denies these allegations, Defendant's Reply SMF ¶ 33, it cites to a memorandum of law, which is not a proper record citation, in support of its denial.

[7] Middlesex protests that this statement, as well, amounts to "groundless speculation." Defendant's Reply SMF ¶ 34. Again, I agree but address the point below.

[8] Middlesex objects that this statement also constitutes "groundless speculation." Defendant's Reply SMF ¶ 38. Again, I agree but address this point below. A separate assertion by Lavoie, that Middlesex "would not let [him] repair" a collapsed floor, as a result of which he "wound up living in his garage," Plaintiff's Opposing SMF ¶ 35, is neither admitted nor supported by the citation given.

[9] Lavoie's statement that his conclusion also was based on "Middlesex's continuing to change its opinion as to the cause of the fire" and "the fact that he had no accelerant in his house," Plaintiff's Opposing SMF ¶ 39, is neither admitted nor supported by the citation given. A related assertion that "Long's conclusion that the fire was set using an accelerant is scientifically invalid," which is supported

(*continued on next page*)

whose theory at that time of the way the fire started and spread was inconsistent with its having started in the basement. Plaintiff's Opposing SMF ¶ 40; Lavoie Dep. at 52.[10] Long took samples of carpet for the specific purpose of having them tested to eliminate the carpet as the source of the accelerant, but, at Middlesex's request, did not have them tested. Plaintiff's Opposing SMF ¶¶ 41-42; Long Dep. at 22. In addition, a dog specially trained to detect accelerants did not find any in Lavoie's house. Plaintiff's Opposing SMF ¶ 43; Grimes Dep. at 19.

6. Because Middlesex refused to pay him, his reputation in the community suffered because his friends and neighbors suspect that he set the fire. Plaintiff's Opposing SMF ¶ 36; Lavoie Dep. at 48. He also suffered emotional distress as a result of Middlesex's handling of the fire investigation. Plaintiff's Opposing SMF ¶ 37; Lavoie Dep. at 41-52.

With respect to carpet testing, Middlesex concedes that carpet samples taken from remote sections of the basement floor away from the area of origin have not been tested, but notes that testing was obtained on floor samples taken from directly beneath those carpet samples. Defendant's Reply SMF ¶ 41; Supplemental Origin and Cause Report ("Supplemental Long Report"), attached as Exh. B to Defendant's Reply SMF, at 2. Long went to a room in the far corner of the basement, moved aside a hope chest that had covered an area of carpet and removed a two-foot by three-foot section of carpet for possible testing. *Id*. At the time, the carpet and floor beneath the hope chest remained water-soaked. *Id*. He also used lime to take samples from the concrete floor directly beneath the carpet section he had removed. *Id*. The lime samples were sent to the lab for analysis. Defendant's Reply SMF ¶ 41; Affidavit of Robert W. Long ("Long Aff."), attached as Exh. C to Defendant's Reply SMF,

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by citation to a memorandum of law, Plaintiff's Opposing SMF ¶ 28, constitutes a legal conclusion rather than an assertion of fact. The same is true of Middlesex's response. *See* Defendant's Reply SMF ¶ 28. To the extent that either party intended to set forth facts asserted in the underlying legal memoranda, that party should have asserted any such facts, together with citations to record materials of evidentiary quality, in separately numbered statements in its or his statement of material facts. Loc. R. 56(c) & (e).

[10] Lavoie's further statement that Grimes' theory was inconsistent with the use of an accelerant, Plaintiff's Opposing SMF ¶ 40, is (*continued on next page*)

¶¶ 8-9. When the results came back positive for the lime samples taken from the floor, it was determined that there was no utility in testing the carpet because it, too, had been sitting in the same water and there were too many contamination issues to render further test results meaningful. Defendant's Reply SMF ¶ 41; Long Aff. ¶ 10.[11]

The Fire Marshal's dogs are not trained to detect the type of accelerant identified by lab testing in this case. Defendant's Reply SMF ¶ 43; Long Dep. at 20. The dogs are trained to identify a range of petroleum-based products, as opposed to products like the kind found in Lavoie's basement. *Id*.

III. Analysis

A. Count II: Negligence

Lavoie alleges in Count II of his complaint, titled "Negligence," that Middlesex owed him duties of care including, but not limited to, duties "[t]o act in a reasonable manner in carrying out its obligations under the contract[,]" "[t]o act in good faith and with due diligence in investigating and paying [his] claim[,]" and "[t]o act in a commercially reasonable manner" and that it breached those duties in the manner in which it investigated his claim and its failure to pay him. Complaint ¶¶ 13, 15.[12]

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neither admitted nor supported by the citation given.

[11] Lavoie objects to paragraph 10 of the Long affidavit on the basis that "[p]rior to the filing of this affidavit, Middlesex never mentioned the possibility of water contamination." Plaintiff's Reply Memorandum in Support of His Motion To Exclude Defendant's Expert Witness ("*Limine* Reply") (Docket No. 28) at 4; *see also* Plaintiff's Opposition at 1-2 (incorporating by reference Lavoie's motion *in limine* to exclude Long's testimony). However, as Lavoie acknowledges, *Limine* Reply at 4, Long did note such a possibility in a document dated May 22, 2000, *see* Supplemental Long Report at 3. I therefore do not discern the kind of contradiction that warrants striking all or a portion of an affidavit submitted on summary judgment. *Compare, e.g.*, *Colantuoni v. Alfred Calcagni & Sons*, 44 F.3d 1, 4-5 (1st Cir.1994) ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.")

[12] Although Lavoie also asserts that Middlesex "was fraudulent in its investigation and determinations regarding the origin of the fire," Complaint ¶ 14, I construe this not as a free-standing claim of fraud, but rather as backdrop to the claim of negligent investigation. In any event, Lavoie adduces no evidence (apart from his own conclusory statements) of fraudulent conduct on the part of Middlesex. Such statements constitute "gauzy generalities [that] are not eligible for inclusion in the summary judgment calculus." *Perez v. Volvo Car Corp*., 247 F.3d 303, 317 (1st Cir. 2001).

Middlesex contends that, in Count II, Lavoie merely dresses up his fundamental claim for breach of contract (Count I) in tort clothing, failing to state a cause of action inasmuch as challenges to an insurer's benefits decision sound in contract, rather than tort. Defendant's Motion at 4. I agree. "Maine law holds that challenges to an insurer's benefits decision arises under contract rather than tort law, no matter what the state of mind of [the insurer.]" *Weaver v. New England Mut. Life Ins. Co.*, 52 F. Supp.2d 127, 131-32 (D. Me. 1999). To state a claim sounding in tort against an insurer, an insured "must demonstrate that [the insurer] committed *independently* tortious conduct *beyond* the denial of [a] claim." *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616 -617 (Me. 1996) (footnote omitted) (emphasis in original).

Lavoie rejoins that genuine issues of material fact exist as to whether Middlesex committed independently tortious acts, namely, negligent claim investigation and negligent (or worse) treatment of him, including delaying resolution of his claim and "'jerking' him around" despite knowledge that he was in a bad way prior to the fire. Memorandum of Law in Opposition to Defendant Middlesex Mutual Assurance Company's Motion for Partial Summary Judgment ("Plaintiff's Opposition") (Docket No. 18) at 2-4.

Count II on its face identifies breach only of duties recognized in Maine as contractual in nature – *i.e.*, duties of good faith, fair dealing and commercial reasonableness that are implied in every contract of insurance. *See, e.g., Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993) ("We . . . refuse to adopt an independent tort action for an insurer's breach of the implied contractual obligation to act in good faith and deal fairly with an insured, and limit an insured's remedies for breach of the duty to the traditional remedies for breach of contract, and the additional statutory remedies provided in the insurance code."). [13]

[13] Remedies available to an insured for breach of an insurer's contractual duty to act in good faith include "full general and (*continued on next page*)

In any event, the conduct of which Lavoie complains is not "independently" tortious. The allegedly negligent investigation was the moving force behind, and is inseparable from, Middlesex's decision to deny coverage. The asserted delays and rudeness – while not in themselves "denial[s] of [a] claim" in a narrow sense – arose from the claims-handling process and implicate the duty of good faith and fair dealing implied under Maine law in all insurance contracts. *See, e.g., id*. at 648, 652. As such, the delay and rudeness allegations fairly can be characterized as contract-rooted challenges to an insurer's decision to deny benefits. *See, e.g., Saltou v. Dependable Ins. Co*., 394 N.W.2d 629, 631, 633 (Minn. Ct. App. 1986) (holding that alleged tortious acts by insurer, which included ten-week delay in payment "[d]espite numerous requests and inquiries" by insured, "are all connected with Dependable's failure to pay appellants' insurance claim in the manner appellants felt it should have been paid. The failure to pay an insurance claim in itself, no matter how malicious, does not constitute a tort; it constitutes a breach of an insurance contract.").

Middlesex accordingly is entitled to summary judgment as to Count II.

B. Counts III and IV: Emotional Distress Claims

In Counts III and IV of his complaint, Lavoie alleges claims for negligent infliction of emotional distress ("NIED") and intentional infliction of emotional distress ("IIED") stemming from Middlesex's conduct. Complaint ¶¶ 17-23. Middlesex argues that (i) to the extent Lavoie's emotional distress flows from the alleged breach of conduct, it is not actionable in this case and (ii) in any event, there is insufficient evidence to support the claims as a matter of law. Defendant's Motion at 4. I agree.

consequential damages." *Marquis*, 628 A.2d at 652.

In Maine, "[a]s a general rule, in order to recover for mental or emotional distress suffered as a result of a breach of contract, the plaintiff must suffer some accompanying physical injury, or the contract must be such that a breach of it will result in a serious emotional disturbance, such as contracts between carriers and innkeepers, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death." *Marquis*, 628 A.2d at 651. An insurance contract "is not one of those 'special' types of contracts warranting damages for a severe emotional disturbance[.]" *Id*.

Lavoie admits that rudeness alone "would probably not be actionable" but argues that despite knowing that he was in a very low emotional, physical, marital and financial state, Middlesex commenced a course of conduct to "jerk" him around, including (i) delaying the taking of his EUO, (ii) being rude on the phone, refusing to return calls and putting him on speaker phone to intimidate him, (iii) refusing to let him repair the floor of his house when it collapsed, so that he wound up living in his garage, (iv) engaging in a negligent investigation and (v) "swaying" the fire marshal to conclude that the fire was intentionally set. Plaintiff's Opposition at 5-6.[14]

This conduct fairly can be characterized as implicating Middlesex's contractual duties – both its express obligation to pay benefits in a timely fashion and the implied covenant of good faith and fair dealing. Inasmuch as (i) this essentially is a breach of contract action, (ii) an insurance policy is not a "special" type of contract inherently warranting damages for severe emotional distress, and (iii) there is no evidence that Lavoie suffered a physical injury as a result of the complained-of acts and omissions, he cannot recover for either NIED or IIED.

[14] Lavoie also asserts that Middlesex's delay in its investigation and refusal to pay him caused his reputation in the community to suffer. Plaintiff's Opposition at 6. This alleges no new conduct on the part of Middlesex, but rather sets forth additional, specific damages assertedly suffered at its hands.

In any event, even assuming *arguendo* that Lavoie alleges tortious conduct independent of his contractual claims, for the following reasons he adduces insufficient evidence to generate a triable issue as to that conduct:

1. With respect to the alleged delay, Lavoie relies on his own testimony at deposition that Middlesex deliberately delayed the EUO process to harass him. Nonetheless, he was unable to disprove Middlesex's contention that his own former counsel was responsible for any such delay. At bottom, his testimony regarding the alleged delay is both conclusory and insufficiently grounded in personal knowledge to stave off summary judgment. *See, e.g., Cadle*, 116 F.3d at 961 n.5 ("A party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment. The difficulty with Hayes' affidavits is not that they are self-serving but that they neither contain enough specifics nor speak meaningfully to matters within Hayes' personal knowledge.") (citation omitted).

2. Lavoie's assertion in his statement of material facts that Middlesex refused to let him repair the floor of his house is neither admitted nor supported by the citation given and, thus, per Loc. R. 56, is not cognizable on summary judgment.

3. The only cognizable evidence that Lavoie adduces of negligent investigation (apart from speculation and personal belief) is that Middlesex prevented Long from testing a piece of carpet and that it drew the conclusion that an accelerant was present even though a drug-sniffing dog detected none. However, Middlesex demonstrates that (i) the dog was not trained to detect the type of accelerant found at the fire site, and (ii) although Long did not test the carpet swatch, he tested flooring directly beneath it, rendering testing of the swatch duplicative and unnecessary.

4. Apart from speculation and personal belief, Lavoie's only proof that Middlesex "swayed" Grimes consists of evidence that Grimes did not initially believe the fire originated in the

basement and that Grimes amended his report (concluding that the fire was intentionally set) at least in part because of information received from Middlesex. This is insufficient to generate a triable issue whether Middlesex's conduct was improper – *e.g.*, that it threatened or intimidated Grimes or otherwise overbore his better judgment.

5. This leaves only Middlesex's asserted rudeness, including failing to return phone calls and placing Lavoie on speaker phone. As Lavoie virtually concedes, such conduct does not rise to the level of actionable infliction of emotional distress. For purposes of IIED, rudeness alone is not enough. *See, e.g., Baker v. Charles*, 919 F. Supp. 41, 46 (D. Me. 1996) (while defendant's conduct "may have been rude, belligerent, uncivil and vindictive," it did not meet Maine IIED standard of conduct "so extreme and outrageous as to exceed all possible bounds of decency") (citation and internal quotation marks omitted). And for purposes of NIED, "psychic injury [must have been] foreseeable given the nature of the defendant's conduct[.]" *FDIC v. S. Prawer & Co.*, 829 F. Supp. 439, 451 (D. Me. 1993). No reasonable jury could find that placing a person on a speaker phone and failing to return an unspecified number of phone calls over an unspecified period of time – the only concrete examples of rudeness Lavoie gives – is conduct that Middlesex reasonably should have foreseen inflicts "psychic injury."[15]

[15] Aside from Lavoie's problem with the vagueness of his evidence, it is not clear that he has a viable standalone cause of action for NIED. Standalone claims of NIED (*i.e.*, those untethered to the commission of a separate tort) lie only in two circumstances: (i) in bystander liability actions and (ii) "in circumstances in which a special relationship exists between the actor and the person emotionally harmed[.]" *Curtis v. Porter*, 784 A.2d 18, 25 (Me. 2001). As the First Circuit has noted, "The Maine Law Court has proceeded cautiously in determining the scope of a defendant's duty to avoid inflicting emotional distress." *Veilleux v. National Broad. Co.*, 206 F.3d 92, 131 (1st Cir. 2000) (declining to recognize "special relationship" for purposes of NIED between journalist and potential subject; expressing reluctance, as court sitting in diversity, "to expand this relatively undeveloped doctrine beyond the narrow categories addressed thus far."); *see also, e.g., Rankin v. Right on Time Moving & Storage, Inc.*, Civ. No. 01-45-B-K, 2002 WL 453245, at *11 (D. Me. Mar. 25, 2002) (declining to recognize "special relationship" for purposes of NIED between common carriers and shippers; noting, "Maine has proceeded cautiously in finding such special relationships and thus far has only found a duty to avoid negligently causing emotional harm in very narrow categories."). I find no Maine case holding that an insurer-insured relationship qualifies as a "special relationship" for purposes of a NIED claim.

Middlesex accordingly is entitled to summary judgment as to Counts III and IV of Lavoie's complaint.

C. Count V: Punitive Damages

In Count V of his complaint, Lavoie seeks punitive damages, asserting that Middlesex's conduct evidenced malice toward him. Complaint ¶¶ 24-28. Middlesex asserts that there is no evidence that it harbored such malice and, in any event, Lavoie is not entitled to recover punitive damages inasmuch as he fails to demonstrate that Middlesex committed independently tortious conduct beyond denial of his claim. Defendant's Motion at 9. The latter point is dispositive. *See, e.g., Colford*, 687 A.2d at 616 ("In order to secure . . . punitive damages in this action, Colford must demonstrate that Chubb committed *independently* tortious conduct *beyond* the denial of Colford's disability claim.") (emphasis in original).

Middlesex accordingly is entitled to summary judgment as to Count V.

D. Count VI: Unfair Trade Practices Act

Lavoie asserts in Count VI of his complaint, titled "Unfair Trade Practice," that he "purchased insurance services from the Defendant primarily for personal, family or household purposes," that he "suffered a loss of money and/or property, both real and personal" and that "[t]his loss was a result of the use or employment by the Defendant of an unfair method, act and practice." Complaint ¶¶ 30-31. Lavoie does not contest Middlesex's argument that the Maine Unfair Trade Practices Act ("UTPA") does not apply to claims by an insured against an insurer. *See* Defendant's Motion at 9-11; Plaintiff's Opposition at 7-10. However, he argues that Count VI should be construed as stating a cause of action pursuant to the Unfair Claims Settlement Practices section of the Maine Insurance Code, 24-A M.R.S.A. § 2436-A or, alternatively, he should now be permitted to amend his complaint to advance such a claim. Plaintiff's Opposition at 7-10.

Although Count VI cites no statutory authority, it clearly refers to the UTPA, parroting a UTPA provision that provides a private remedy to "[a]ny person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 [which proscribes, *inter alia*, "unfair or deceptive acts or practices in the conduct of any trade or commerce"] . . . ." 5 M.R.S.A. §§ 207, 213. Count VI cannot reasonably be construed as setting forth a cause of action pursuant to the Maine Insurance Code.

Nor does Lavoie make a persuasive case for amendment of his complaint at this point in the litigation. First, he offers no excuse whatsoever for his tardy assertion of an entirely new claim. *See* Plaintiff's Opposition at 8-9. He contends that "the nature of [his] claim has always been clear, no additional discovery will be required, and defendant will be in no way prejudiced." *Id*. at 9. However, inasmuch as appears, the existence of a Maine Insurance Code claim was not made clear until after Middlesex moved for summary judgment – a seemingly inherent disadvantage to Middlesex. *See, e.g., Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995) ("At a bare minimum, even in this age of notice pleading, a defendant must be afforded both adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense."). Nor has this new issue, in essence, been "tried" on summary judgment by express or implied consent. *See* Defendant's Reply to Plaintiff's Opposition to Motion for Partial Summary Judgment (Docket No. 26) at 6-7 (objecting to late amendment, omitting to address merits of newly asserted claim). Under the circumstances, the requested amendment should be denied.

Middlesex accordingly is entitled to summary judgment as to Count VI of Lavoie's complaint.

IV. Conclusion

For the foregoing reasons, I recommend that the court **GRANT** Middlesex's motion for partial summary judgment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of April, 2002.

_____
David M. Cohen
United States Magistrate Judge

PORTLD STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-93

LAVOIE v. MIDDLESEX MUTUAL Filed: 05/18/01
Assigned to: JUDGE GENE CARTER Jury demand: Defendant
Demand: $0,000 Nature of Suit: 110
Lead Docket: None Jurisdiction: Diversity
Dkt # in Kennebec Superior : is CV-01-61

Cause: 28:1332 Diversity-Insurance Contract

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[term 09/25/01]

SUSAN ORAM, ESQ.
[term 09/25/01]
[COR LD NTC]
BONNEAU & GEISMAR, LLC
100 LISBON STREET

PO BOX 7230
LEWISTON, ME 04243-7230
777-5200

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MIDDLESEX MUTUAL ASSURANCE COMPANY
counter-claimant

LAURENCE H. LEAVITT
761-0900
[COR LD NTC]
FRIEDMAN, GAYTHWAITE, WOLF & LEAVITT
SIX CITY CENTER
P. O. BOX 4726
PORTLAND, ME 04112-4726
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v.

GEORGE DAVID LAVOIE
counter-defendant

JOHN E. SEDGEWICK
784-3576
[COR LD NTC]
BERMAN & SIMMONS, P.A.
P. O. BOX 961
LEWISTON, ME 04243-0961
784-3576

SEAN M. FARRIS, ESQ.
[term 10/17/01]
[COR LD NTC]
FARRIS, HESELTON, LADD & BOBROWIECKI, P.A.
P.O. BOX 120
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207-582-3650